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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1943

No. 148

N. N. S. MATCOVICH,
Petitioner,

vs.

CLIFFORD C. ANGLIM, as Collector of Internal Revenue for the First District of California,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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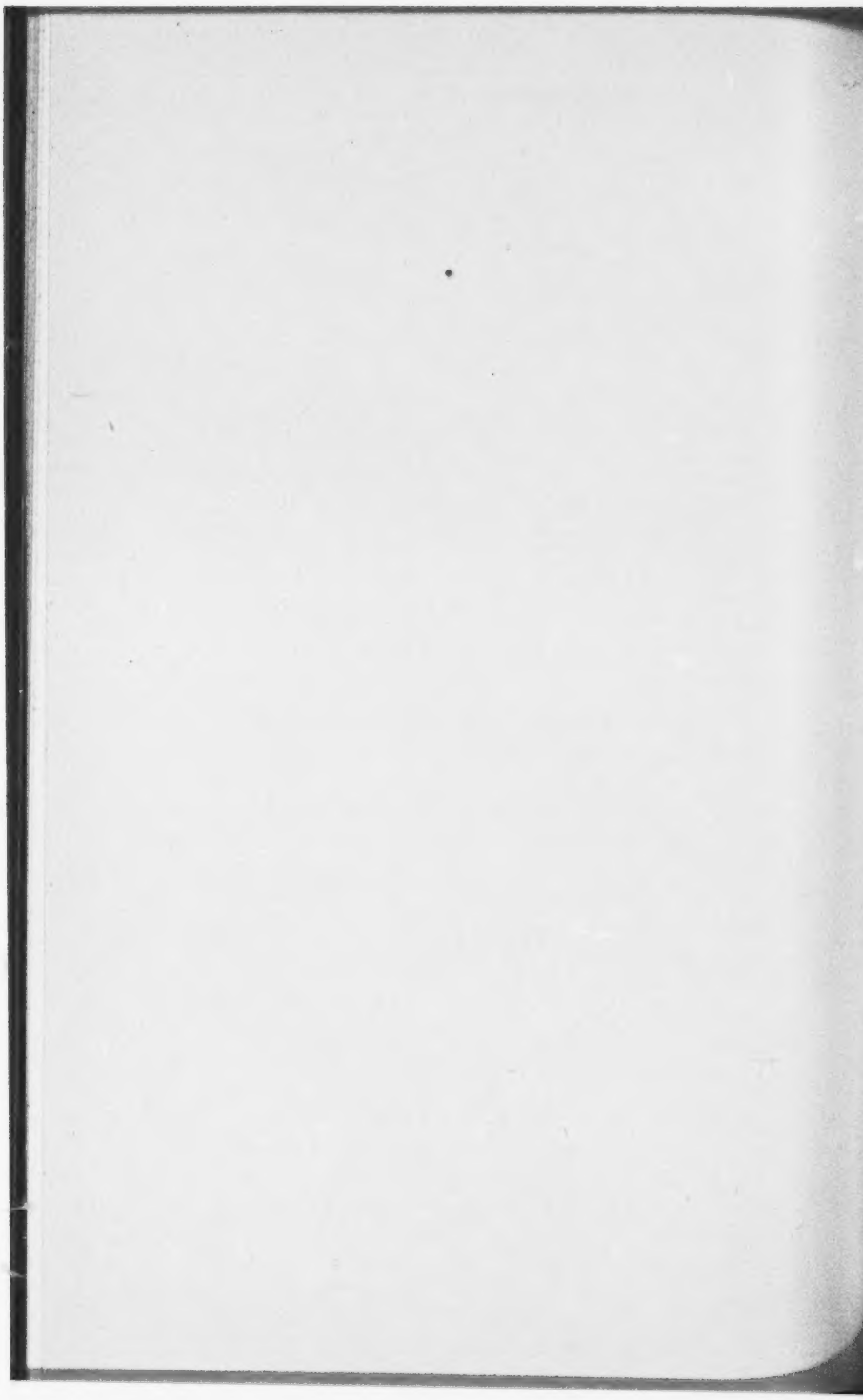

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(1) The Ninth Circuit of the Court of Appeals differs in the construction of the rule laid down in Griffith v. Commissioner, 308 U. S. 355-358 from that of the Fifth Circuit in the case of Commissioner v. Falcon Co., 127 Fed. (2d) 277, in that the Fifth Circuit holds the rule only applies when an issue of fraud or subterfuge has been raised. If the construction given by the Fifth Circuit is correct then the judgment here should be reversed	10
(2) The Circuit Court erred in holding that the state law was not controlling since it held that the relationship of employer and employee should be established under the common law while we find there is little if any difference between the common law and the state law, and further the case of Childers v. Commissioner, supra, held that the California law should be applied where the same issue was raised between California citizens	13
(3) Since this license agreement was made between citizens of California and in the State of California, it should have been construed under the laws of the State of California and as thus construed, it was conclusive on the origin and existence of the relationship between appellant and said women	15
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PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

SUMMARY OF STATEMENT OF MATTERS INVOLVED.

Action was brought to recover two thousand four hundred twenty-six dollars and twenty-five cents

($2426.25) paid by petitioner to respondent for taxes alleged to have been due under Title XI of the Social Security Act. After payment was made and claim for refund denied, action was instituted. Petitioner claims that the relation of employer and employee did not exist and hence, the Social Security Act was not applicable.

The complaint alleges that plaintiff licensed the women in question to use his premises for the purpose of dancing. (R. 3.) Respondent by his answer raised the sole issue that the relationship between petitioner and said ladies was that of employer and employee. (R. 22.) No issue of fraud or charge that petitioner formulated a scheme to evade the tax in question was involved. Upon a trial of the action, judgment was entered in favor of respondent. (R. 28.) From this judgment an appeal was taken to the Circuit Court of Appeals (Ninth Circuit). (R. 32.) The judgment was affirmed by that Court. (R. 145.) In affirming the judgment, the Circuit Court predicated its opinion upon the case of *Griffith v. Commissioner,* 308 U. S. 355-358, which we claim is not applicable because no issue of fraud or scheme to evade the tax was involved. (R. 144.) That it is not applicable is pointed out in the case *Commissioner v. Falcon Co.,* 127 Fed. (2d) 277 (Fifth Circuit), and by the minority opinion in *Campana Corporation v. Harrison,* 114 Fed. (2d) 400 (Seventh Circuit).

The Circuit Court holds that the case of *Griffith v. Commissioner,* supra, disposes of the license agreement which establishes the relationship between the

parties, even though no issue of fraud is made or that the license agreement was entered into for the purpose of avoiding the tax, which holding is contrary to that of the Fifth Circuit. (R. 144.)

The Circuit Court further stated that if the state law should be applied by virtue of a State Court decision, the judgment would have to be reversed, but concluded, "the State Law is not controlling". (R. 143.) However, according to its own decision, there is no difference between the state law and the federal law on the question as to what constitutes the relationship of employer and employee.

JURISDICTION.

The date of the judgment of the Circuit Court of Appeals to be reviewed is March 30, 1943, which is reported in 134 Fed. (2d) 834. Within time (Rule 25, Rules of the United States Circuit Court of Appeals for the Ninth Circuit) petitioner applied for a rehearing before the said Circuit Court of Appeals which was denied on May 22, 1943. (R. 146.) The judgment sought to be reviewed thus became final. The statutory provisions under which jurisdiction of this Court is invoked is the Judicial Code, Section 240 (a) amended, 28 U. S. C. A. Section 347. The cases believed to sustain the jurisdiction to review decisions of the Circuit Court of Appeals are:

Forsyth v. Hammond, 166 U. S. 506-512;

Hamilton, etc. v. Wolf Bros. & Co., 240 U. S. 251-258.

THE QUESTIONS PRESENTED.

The principal questions involved are as follows:

1. Whether the rule announced in *Griffith v. Commissioner,* 308 U. S. 355-358, should be limited to those cases in which an issue of fraud has been raised, or an issue that a scheme was created to evade a tax is involved, or should be applied generally.

2. Whether the federal law for establishing the relationship of employer and employee is different from the state law.

3. Whether or not a license agreement made in the State of California should be construed according to the laws of the State of California.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals for the Ninth Circuit by its opinion in this case has reached a conclusion that conflicts with the decision reached by the Fifth Circuit in the case, *Commissioner v. Falcon Co.,* 127 Fed. (2d) 277, and is contrary to the rule as announced by the minority opinion in the case, *Campana Corporation v. Harrison,* 114 Fed. (2d) 400-412 (Seventh Circuit).

2. That the right to contract for the purpose of establishing the relationship of employer and an independent contractor is abridged by the Circuit Court. The Circuit Court opinion is contrary to the holding

in *Reeves v. Howard Refining Company,* 33 Fed. Supp. 90, and *Gregory v. Helvering,* 293 U. S. 465 (55 S. Ct. 266, 79 L. Ed. ..... If the opinion of the Circuit Court is permitted to stand no one will be able to enter into a contract creating the relationship of an independent contractor or a license agreement where a taxing agency is involved. The Circuit Court should have construed the license agreement under the laws of the State of California as it was executed in California, and as thus construed should have held that the controls referred to in its opinion could properly be exerted through the license agreement.

BRIEF.

Brief in support of petition for writ of certiorari.

PRAYER.

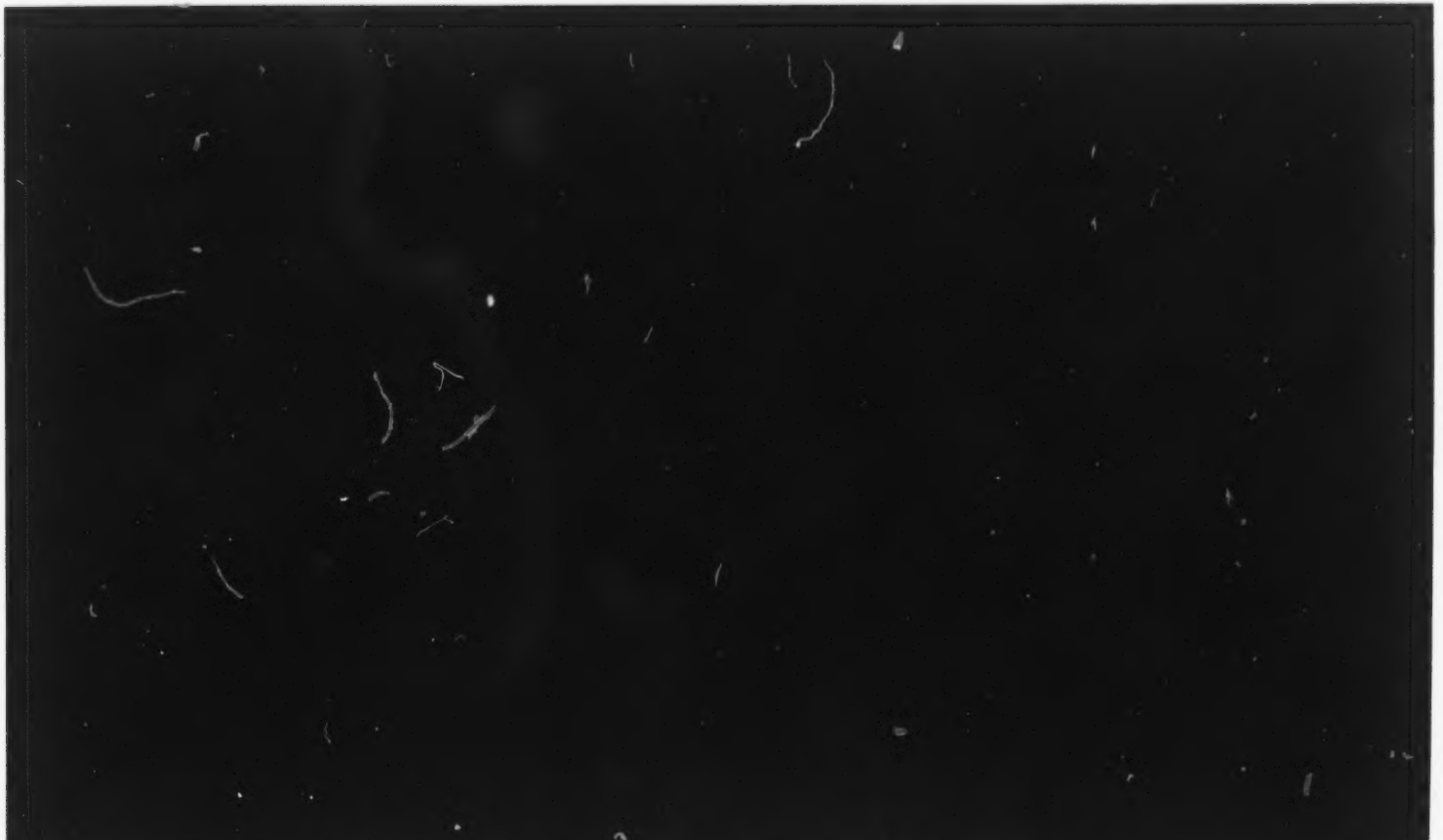
Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Honorable Court on a day certain to be therein designated a full and complete transcript of the record and all proceedings in said case numbered and entitled in said Court No. 10,306, N. N. S. Matcovich, appellant v. Clifford C. Anglim, as Collector of Internal Revenue for the First District of California, appellee, to the end that said case may be reviewed and determined by this Court as provided by

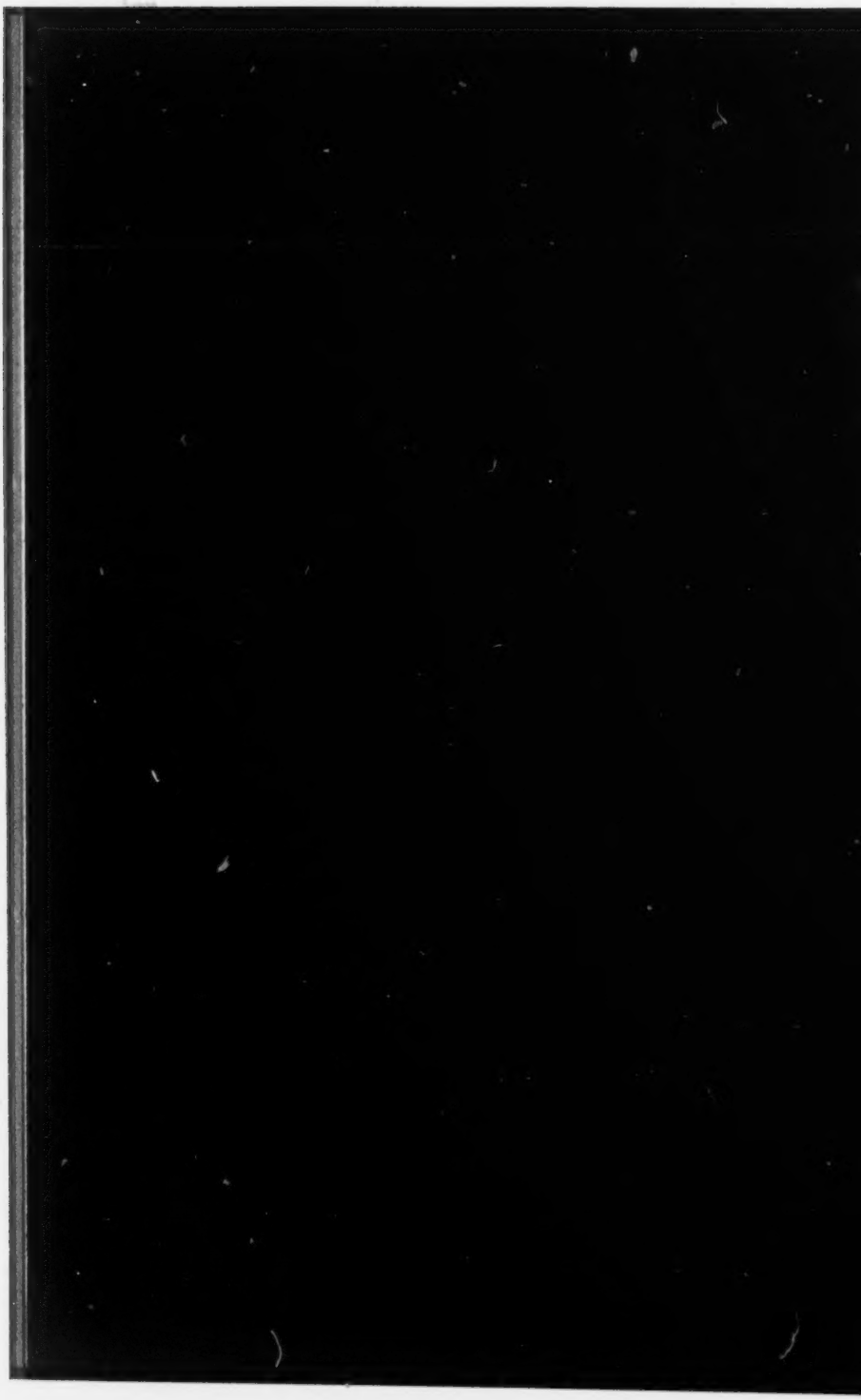
law and that said judgment of said United States Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Court may seem meet, just and proper.

Dated, Sacramento, California,
June 28, 1943.

HORACE B. WULFF,
Counsel for Petitioner.

R. H. SCHWAB,
Of Counsel.





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No.

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CLIFFORD C. ANGLIM, as Collector of Internal Revenue for the First District of California,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

PRELIMINARY MATTER.

The petition makes reference to the judgment below, states the jurisdictional grounds and states the facts, which statements are adopted.

SPECIFICATION OF ERRORS.

We believe that the Court erred as follows:

(1) The holding of the Ninth Circuit Court of Appeals that the case of *Griffith v. Commissioner,* 308 U. S. 355-358, overrides the license agreement in question where at no time was there any issue of fraud or claim made that the license agreement was drawn for the purpose of avoiding the tax in question, which holding is contrary to that in *Commissioner v. Falcon Co.,* 127 Fed. (2d) 277 (Fifth Circuit).

(2) The Court erred in holding that the state law was not controlling. It held that the employer-employee relationship should be determined according to the principles of common law. While it previously held in the case of *Childers v. Commissioner,* 80 Fed. (2d) 27-30, that the California law fixed the standard by which that relationship should be determined, the principles announced in the *Childers* case were not followed in the case at bar.

(3) That it erred in holding that the license agreement under the laws of the State of California was not conclusive on the origin and existence of the relationship to be a license and not an employment contract.

SUMMARY OF ARGUMENT.

(1) The rule announced in the case of *Griffith v. Commissioner,* 308 U. S. 355-358, to the effect "taxes cannot be escaped by anticipatory arrangements and contracts, however skillfully devised", should be lim-

ited to cases involving fraud or subterfuge. Some reason must be established before a contract can arbitrarily be set aside.

(2) Since the Circuit Court holds that the relationship of employer-employee should be fixed according to the standard of the common law and that there is no substantial difference between the common law and the California law, the conclusion that the state law is not controlling cannot be sustained. In addition, the Circuit Court in the case of *Childers v. Commissioner,* 129 Fed. (2d) 27-30, laid down the rule that under the similar circumstances that relationship was to be determined according to the California law.

(3) That according to the decisions of the Federal Courts, the license agreement should have been construed under the laws of the State of California.

ARGUMENT.

(1) THE NINTH CIRCUIT OF THE COURT OF APPEALS DIFFERS IN THE CONSTRUCTION OF THE RULE LAID DOWN IN GRIFFITH v. COMMISSIONER, 308 U. S. 355-358 FROM THAT OF THE FIFTH CIRCUIT IN THE CASE OF COMMISSIONER v. FALCON CO., 127 Fed. (2d) 277, IN THAT THE FIFTH CIRCUIT HOLDS THE RULE ONLY APPLIES WHEN AN ISSUE OF FRAUD OR SUBTERFUGE HAS BEEN RAISED. IF THE CONSTRUCTION GIVEN BY THE FIFTH CIRCUIT IS CORRECT THEN THE JUDGMENT HERE SHOULD BE REVERSED.

We take the following quotations from the Court's opinion:

> "Appellant contends that under the State Law the license agreement was conclusive, but as stated above the State Law is not controlling. Appellant further contends that the conclusions of the Court below were erroneous, and argues that the agreements between him and the women definitely fixed their relationship as that of licensor and licensee, and that the other evidence regarding his 'control' over the women was as consistent with a 'license' as it was with an employer-employee relation." (R. 143.)

And again after quoting the common law and referring to the testimony, concludes,

> "Under ordinary standards an employer-employee relationship is indicated. It must be recognized, however, that all of these controls could be exercised through a license arrangement. If we are to consider the license agreement between the parties as conclusive on the origin and existence of the relationship, then it is clear that the arrangement between the parties was a license." (R. 144.)

The Circuit Court while recognizing that "all of these controls" could be exercised through the license agreement, gives as its sole answer to our contention that the license agreement is controlling, the rule laid down in *Griffith v. Commissioner,* 308 U. S. 355-358 from which the Circuit Court quotes as follows:

> "* * * Legislative words are not inert, and derive vitality from the obvious purposes at which they are aimed * * * taxes cannot be escaped 'by anticipatory arrangements and contracts however skilfully devised * * * by which the fruits are attributed to a different tree from that on which they grew.' Lucas v. Earl, 281 U. S. 111, 115 * * *" (R. 144.)

This case, however, can have no application here for the reason that it is based upon fraud. That the arrangement entered into between the parties was for the purpose of evading the income tax in question. That was one of the issues in the case. The Fifth Circuit in *Commissioner v. Falcon,* 127 Fed. (2d) 277, after referring to the *Griffith* and like cases said:

> "Here the record shows no fraud, sham, or subterfuge, or use of mere form to hide the substance of the real transaction."

Judge Major, in his dissenting opinion in *Campana Corporation v. Harrison,* 114 Fed. (2d) 400, 412 (Seventh Circuit) said,

> "It must not be overlooked that the plaintiff is not charged with formulating a scheme or device with the purpose of evading taxation. Cases such as Griffith v. Commissioner, 308 U. S. 35, and Higgins v. Smith, 308 U. S. 473, have no application".

It is obvious that the construction of the *Griffith* case given by the Ninth Circuit is contrary to that of the Fifth Circuit. It would seem that the construction of the Fifth Circuit is most logical. A trial Court can not arbitrarily set aside a written agreement, even though it may have the result of avoiding a tax unless fraud or a subterfuge is found. But fraud or subterfuge must be made an issue in the case in order to set it aside. No issue of fraud or subterfuge was raised in this case. The rule in the *Griffith* case should be limited to those cases involving fraud or subterfuge. If this be not done, then right to contract in employment matters has certainly been infringed upon where a taxing agency becomes involved. A contract creating an independent contractor in those instances would not be of any avail according to *Reeves v. Howard etc.,* 33 Fed. Supp. 90. The right to contract is still sacred and applies to employment contracts. See also *Gregory v. Helvering,* 293 U. S. 465, 79 L. Ed. 596. If we assume that the rule announced by the Fifth Circuit is correct, then the judgment should be reversed.

(2) THE CIRCUIT COURT ERRED IN HOLDING THAT THE STATE LAW WAS NOT CONTROLLING SINCE IT HELD THAT THE RELATIONSHIP OF EMPLOYER AND EMPLOYEE SHOULD BE ESTABLISHED UNDER THE COMMON LAW WHILE WE FIND THERE IS LITTLE IF ANY DIFFERENCE BETWEEN THE COMMON LAW AND THE STATE LAW, AND FURTHER THE CASE OF CHILDERS v. COMMISSIONER, SUPRA, HELD THAT THE CALIFORNIA LAW SHOULD BE APPLIED WHERE THE SAME ISSUE WAS RAISED BETWEEN CALIFORNIA CITIZENS.

The basic reason given by the Circuit Court of Appeals for not applying the standard fixed by the California law was that there is a difference between the Federal law and the State law as to the elements going to establish the employer-employee relationship. The Circuit Court readily admits that if the State law was applied, the judgment should have been reversed. It held, however, that the "State law is not controlling". The question that arises therefore is, does the State law differ from the Federal law in this particular.

The fact that a tax law is involved should not affect the situation. According to the Circuit Court opinion, apparently it does not because it held in *Anglim v. Empire Star Mines Co.*, 129 F. (2d) 914-917, that the regulation established for use in connection with the Social Security Act does no more than reiterate the familiar principles of common law. Obviously, the standard to determine the employer-employee relationship is laid down by the common law. The Circuit Court quotes from 35 Am. Jur. 445, Sec. 3, for the purpose of showing the elements required at common law to establish the relationship of master and servant. When you compare these elements with the California law, you will find little, if any difference.

However the Circuit Court of Appeals (Ninth Circuit) in the case of *Childers v. Commissioner,* 80 Fed. (2d) 27-30 where the employer-employee relationship was under consideration in connection wtih the Federal Income law, applied the California law in determining whether that relationship existed. It quoted approvingly from the following cases:

Green v. Soule, 145 Cal. 96-99;

Western Indemnity Co. v. Pillsbury, 172 Cal. 807-811;

Fidelity etc. Co. v. Industrial Accident Commission, 191 Cal. 404, 407.

If the California law was applied to the facts and circumstances found in the *Childers* case, then why should not the same standards be applied to the case at bar? In principle there is no distinction between the *Childers* case and the case at bar. Taxing acts and California citizens were involved in both cases.

According to the Circuit Court, the standard for determining the existence of the relationship of employer and employee is fixed by the principles of common law and not by the taxing act or regulations promulgated. If we are to be guided by the *Childers* case, then it is obvious that the Circuit Court erred in not applying the same principles to the case at bar.

With all due deference to the Circuit Court of Appeals of its discussion regarding "a nationwide scheme of taxation" we say that such discussion is beside any issue raised in this case. The main issue in the case at bar was whether the relation of employer and employee existed. If this is to be determined according to the standard of the common law then question

naturally follows, was there any difference between the State law and the Federal law. If the standard fixed by the common law was substantially the same as fixed by the State law, then the statement of the Circuit Court that the "State law is not controlling" cannot be sustained. The *Childers* case supra has fixed the standard by which the relationship in this case should have been established.

---

(3) SINCE THIS LICENSE AGREEMENT WAS MADE BETWEEN CITIZENS OF CALIFORNIA AND IN THE STATE OF CALIFORNIA, IT SHOULD HAVE BEEN CONSTRUED UNDER THE LAWS OF THE STATE OF CALIFORNIA AND AS THUS CONSTRUED, IT WAS CONCLUSIVE ON THE ORIGIN AND EXISTENCE OF THE RELATIONSHIP BETWEEN APPELLANT AND SAID WOMEN.

A contract should be construed under the laws of the State in which the same is made.

Metropolis v. Kennedy, 84 U. S. 19;
George v. Tait, 102 U. S. 564;
Lewis v. Tollurido, 270 Fed. 590;
Missouri v. Holt, 293 Fed. 155;
Russell v. Young, 94 Fed. 45, 36 C.C.A. 71;
Philadelphia v. Trimble, 77 U. S. 367, 10 Wall. 367, 19 L. Ed. 948;
Paige v. Banlos, 80 U. S. 608, 13 Wall. 608, 20 L. Ed. 709.

The law of California in regard to the construction of contracts is found in the following sections of the Civil Code:

1625, 1636, 1637, 1638, 1639, 1641, 1643. Also Sec. 1856, Code of Civil Procedure and 6 Cal. Jur., Sec. 167.

According to the law of California where the contract is definite and certain, oral evidence is not admissible for the purpose of changing the intent of the parties as expressed in the writing. In other words, the intentions of the parties is to be determined from the instrument itself if it is certain and definite.

The Circuit Court, as did the trial Court, entirely ignored the written license notwithstanding the fact that it was definite and certain and on its face showed the relationship to be that of licensor or licensee. It did so without any issue being raised that the instrument was procured through fraud or was for the purpose of perpetrating a subterfuge. It is apparent that the Circuit Court erroneously concluded that where a taxing agency is involved that it is not bound by agreements made between parties for the purpose of establishing an employment relationship between them.

CONCLUSION.

There now exists a difference between the Circuit Courts of Appeals as to what extent the rule laid down in the case of *Griffith v. Commissioner,* supra, should apply. This difference should be settled.

It should be definitely established that the State law should be the guide in establishing the employer-employee relationship, particularly where the State law and common law are the same.

The Circuit Court upheld the trial Court in avoiding the written license involved simply because a tax-

ing agency was involved. Since there was no issue of fraud or subterfuge, it violated appellant's right to contract. It should have held that a written contract cannot be arbitrarily set aside, unless one of the those issues so justify.

This Court should review the decision of the Circuit Court of Appeals and finally reverse it.

Dated, Sacramento, California,
June 28, 1943.

Respectfully submitted,
HORACE B. WULFF,
Counsel for Petitioner.

R. H. SCHWAB,
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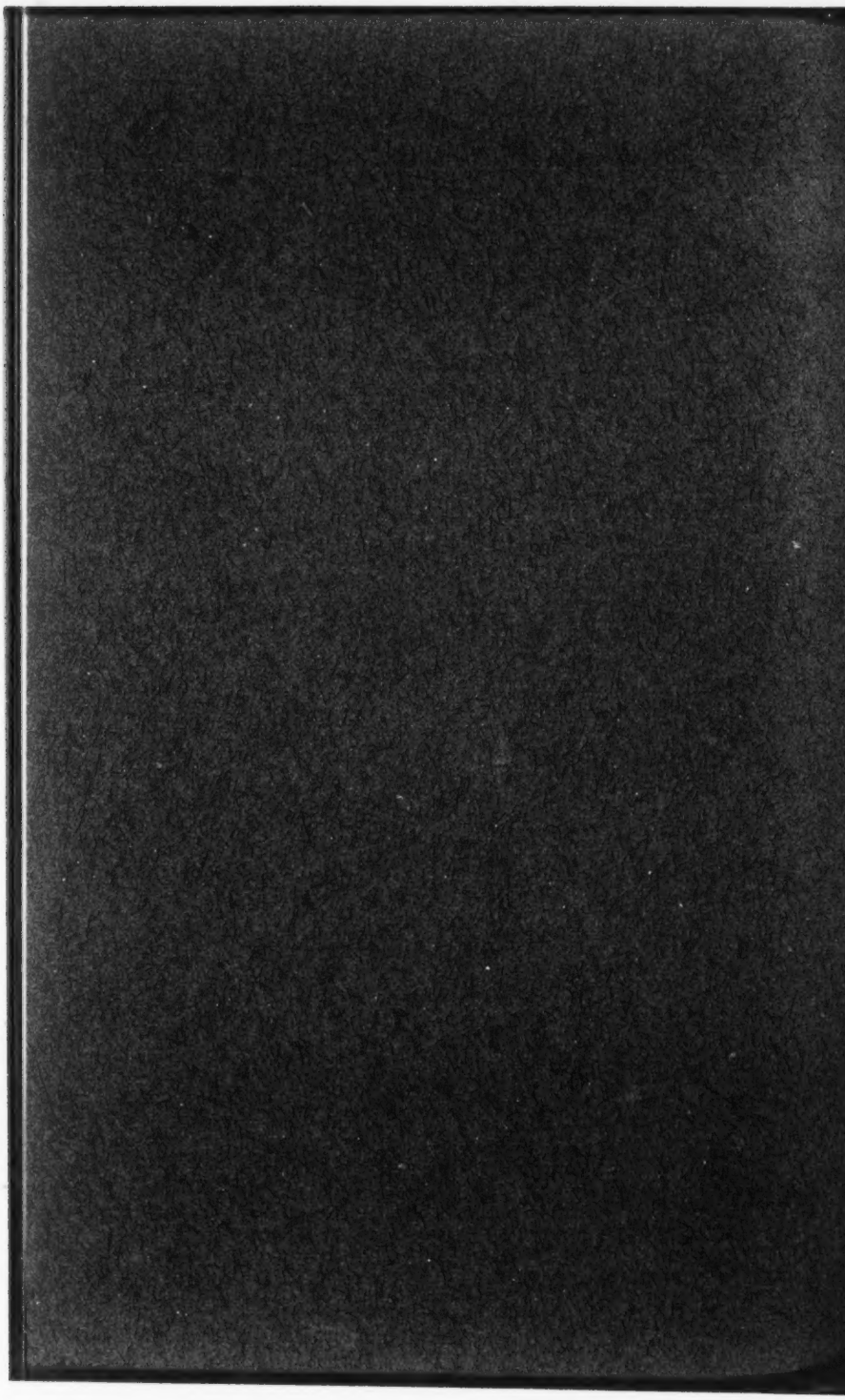

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CITATIONS

Statute:	
Social Security Act, c. 531, 49 Stat. 620:	
Sec. 901 (U. S. C., Title 42, Sec. 1101)	2
Sec. 907 (U. S. C., Title 42, Sec. 1107)	3

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v.

CLIFFORD C. ANGLIM, AS COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

There is no opinion of the District Court. The opinion of the Ninth Circuit Court of Appeals (R. 138) is reported in 134 F. 2d 834.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 30, 1943 (R. 146). A petition for a rehearing was filed by the taxpayer on April 17, 1943, and was denied by the Circuit Court of Appeals on May 22, 1943 (R. 146). The petition for a writ of certiorari was filed July 6, 1943.

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Circuit Court of Appeals erred in holding that the petitioner was the employer of the women dancers in the dance hall operated and owned by him and therefore liable for taxes levied by the Social Security Act.

STATUTE INVOLVED

Social Security Act, c. 531, 49 Stat. 620:

> SECTION 901. On and after January 1, 1936, every employer (as defined in section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year:
>
> (1) With respect to employment during the calendar year 1936 the rate shall be 1 per centum;
>
> (2) With respect to employment during the calendar year 1937 the rate shall be 2 per centum;
>
> (3) With respect to employment after December 31, 1937, the rate shall be 3 per centum.
>
> (U. S. C., Title 42, Sec. 1101.)

* * * * *

SECTION 907. When used in this title—

(a) The term "employer" does not include any person unless on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were in his employ for some portion of the day (whether or not at the same moment of time) was eight or more.

(b) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash.

(c) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except— * * *.

(U. S. C., Title 42, Sec. 1107.)

STATEMENT

This case was tried by the District Court, sitting without a jury (R. 23–24). The court made the following findings of fact (R. 24–27):

1. That during the period beginning January 1, 1937, to and including December 31, 1937, the taxpayer controlled and operated a dance hall located in the City of Sacramento, State of California, known as the "Rio Ball Room." A beer garden where refreshments were sold was operated by taxpayer in connection with the dance hall. During all of this time the taxpayer owned

and/or furnished all of the equipment and supplies used in the conduct of the beer garden and ballroom, and paid the rental of the hall to the owner thereof. The number of taxpayer's employees at all times exceeded eight persons. Complete control of egress and ingress, the selling of tickets, the dance floor, the beer garden, and all adjuncts, was exercised by taxpayer. (R. 24.)

2. The taxpayer made arrangements for a sufficient number of women dancers, commonly referred to as "taxi dancers" to dance with the male patrons of the dance hall. Each "taxi" dancer was "licensed" by taxpayer. On arrival she reported either to taxpayer or his agent. The hours during which the taxi dancers should be present in the dance hall, and the length of time to be consumed by them in drinking with male patrons, were prescribed by the taxpayer. The dress, deportment, and behavior of the taxi dancers were controlled and prescribed by taxpayer. (R. 24–25.)

The compensation of the taxi dancer was paid as follows: Dance tickets were sold by taxpayer to male patrons at ten cents per ticket. The ticket gave the purchaser the right to dance with a taxi dancer. She was obliged to dance with a ticket holder whenever he presented himself. The ticket was surrendered to the taxi dancer at the beginning of each dance. At the conclusion of the

evening, the taxi dancer presented her tickets to the taxpayer's cashier, who paid her five cents for each ticket surrendered by her. The taxi dancer was paid a commission upon the refreshments purchased by her male partner. She was obliged to dance a certain number of dances which were "free," i. e., she did not receive compensation for them, although the male dancer paid for each dance. (R. 25.)

3. Before securing the right to dance at the Rio Ball Room, each taxi dancer applied to and received from the taxpayer a license or contract which in terms gave her the privilege of dancing with the patrons of the dance hall in consideration of the payment to the dance hall of part of the money earned by her. The license or contract in terms specified that the woman dancer was a licensee and would not become an employee of the dance hall. (R. 25–26.) The license also contained the agreement that (R. 26):

> The licensee agrees to abide by regulations established by the undersigned (Rio Ball Room) in the operation of its business.

The taxpayer reserved and, in fact, exercised the right to hire and to discharge the women dancers (R. 26).

The Commissioner of Internal Revenue made an assessment under the Social Security Act which was and is based on the amount paid by taxpayer

to the taxi dancers of the Rio Ball Room during 1937. Between June 25, 1939, and December 16, 1940, taxpayer paid to the Collector of Internal Revenue the sum of $2,426.25 (inclusive of interest and penalties) on account of the tax assessment for Social Security taxes. Thereafter, and within the time permitted by law, taxpayer filed with the Commissioner of Internal Revenue a claim for refund of such tax payments grounded on the claim that the women dancers were not employees of the taxpayer and that the relationship which existed between taxpayer and the women dancers during the whole of such period was one of independent contractor and independent contractee. On July 10, 1941, the claim for refund was rejected. The suit herein was based upon the same ground as the ground relied on in the claim for refund. (R. 26–27.)

Upon the basis of these findings the trial court concluded that the women dancers were employees of the petitioner and ruled that the Commissioner had correctly rejected the claim for refund (R. 27). The court below affirmed.

ARGUMENT

Title IX of the Social Security Act provides that on or after January 1, 1936, every employer shall pay for each calendar year an excise tax, with respect to having individuals in his employ.

The court below held, correctly we submit, that the relationship between the taxpayer and the taxi dancers who worked in the hall operated by him was that of employer and employees within the meaning of the Social Security Act. Although it may be conceded that the dancers were allowed a certain amount of latitude in their work, it is nevertheless clear that petitioner exercised sufficiently continuous supervision over them so as to render them employees rather than independent contractors. The case turns upon its own facts and does not call for further review.

Respectfully submitted.

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In the Supreme Court
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United States

OCTOBER TERM, 1943

No. 148

N. N. S. MATCOVICH,
Petitioner,

vs.

CLIFFORD C. ANGLIM, as Collector of Internal Revenue for the First District of California,
Respondent.

CLOSING BRIEF OF PETITIONER.

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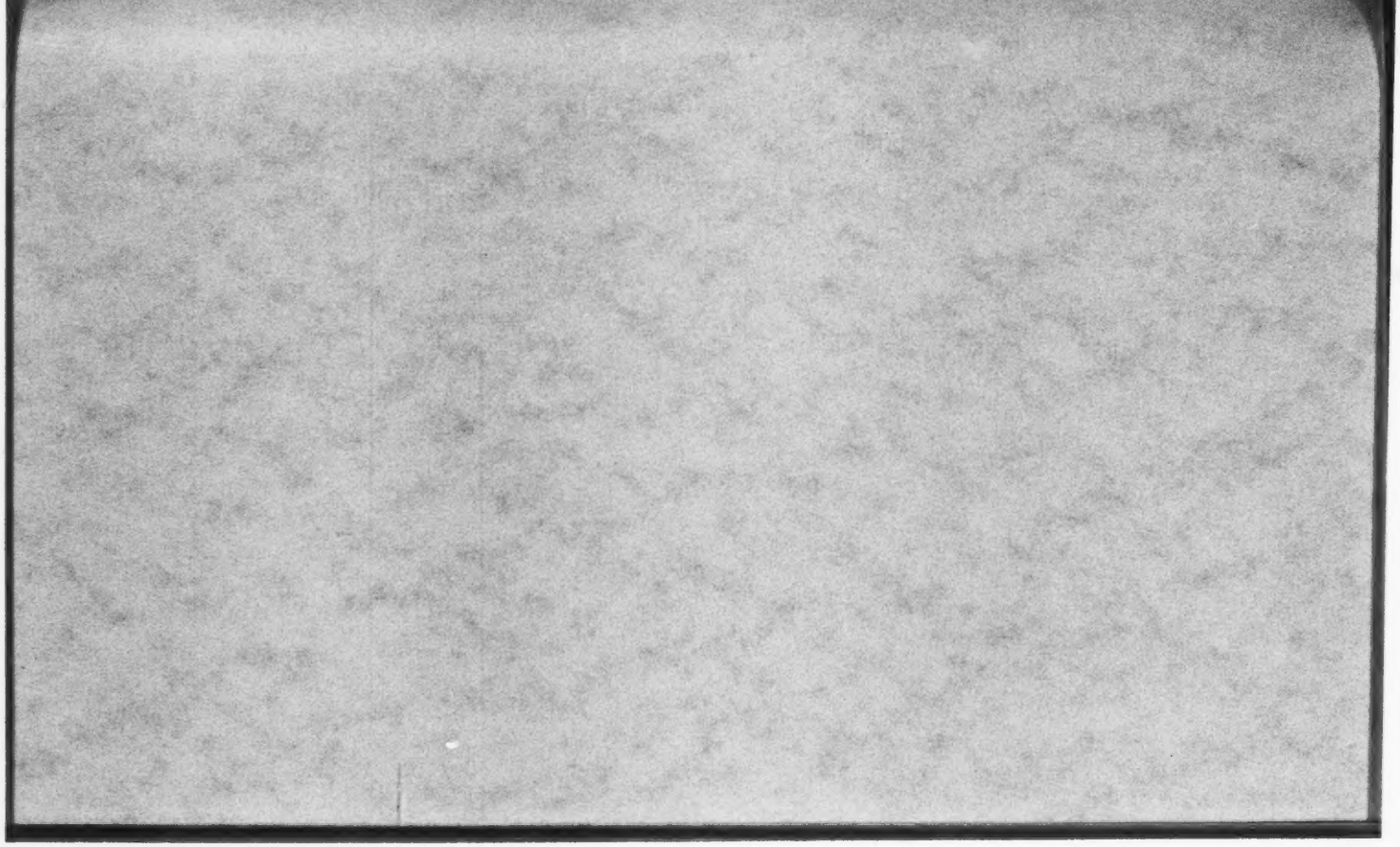

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Respondent makes no answer to the points made in our opening brief except to say "the case turns upon its own facts and does not call for further review". (Resp. Brief, p. 7.)

The lower Court found that the written license was actually entered into between the dancer and the petitioner. (R. 25-26.) This clearly establishes a relationship of an independent contractor and is clearly inconsistent with an employer-employee relationship. Not-

withstanding this written agreement, the lower Court concluded from the other findings that the petitioner exercised such control as would justify the conclusion that the relationship of employer-employee existed. It ignored the written agreement without any issue of fraud or subterfuge being presented. The authorities set out on pages 15 and 16 of our opening brief hold to the contrary. Consequently it is not a factual situation but a question of law as to whether a Court can set aside a written agreement which establishes their relationship without some equitable ground for so doing, such as fraud or subterfuge.

In considering this matter the Circuit Court said:

> "If we are to consider the license agreement between the parties as conclusive on the origin and existence of the relationship, then it is clear that the arrangement between the parties was a license." (R. 144.)

It then concludes, however, that the rule laid down in *Griffith v. Commissioner,* 308 U. S. 355-58, permits the setting aside of the written contract. (R. 144.) This is contrary to the holding of the Fifth Circuit in *Commissioner v. Falcon,* 127 Fed. (2d) 277. If the Federal Court had not definitely found that the written agreement was in effect, the situation would have been entirely different. Having so found, it was not within the province of the Court to set it aside without finding that it had been entered into through fraud or for the purpose of subterfuge.

The Circuit Court in considering the evidence on control recognized "that all of these controls could be

exerted through a license agreement". (R. 144.) Such evidence was consistent with the license agreement. What becomes of the written agreement? According to *Commissioner v. Falcon,* supra, under the circumstances in this case, it stands until set aside for fraud or subterfuge.

Dated, Sacramento, California,
August 23, 1943.

Respectfully submitted,
HORACE B. WULFF,
Counsel for Petitioner.

R. H. SCHWAB,
Of Counsel.